No. 21939

In the

United States Court of Appeals

For the Ninth Circuit

SONOCO PRODUCTS COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Brief for Petitioner

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JURISDICTIONAL STATEMENT

This is a petition by SONOCO PRODUCTS COMPANY ("Sonoco") from an order of the NATIONAL LABOR RELATIONS BOARD ("Board") finding Sonoco guilty of a refusal to bargain with certain unions (Brotherhood of Teamsters and Auto Truck Drivers, Local No. 70, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Warehouse, Processing and Allied Workers, Local No. 6, International Longshoremen's and Warehousemen's Union). This court has jurisdiction under Section 10 (f) of the National Labor Relations Act ("Act"), 29 U.S.C. sec. 160 (f).

STATEMENT OF THE CASE

The unions filed petitions seeking to represent, in either distinct units or jointly, the production, maintenance, truck drivers and driver helpers employed in Sonoco's plant in Hayward, California (R. 4, 5). Separate representation was resisted by Sonoco and, after a hearing, the Regional Director for the 20th region of the Board found a single unit to be appropriate and directed that an election be held therein (R. 5).

This election was held on March 23, 1966, and resulted in a vote of seventeen to thirteen against representation by the unions (R. 7). To this result the unions filed objections (R. 8). On the day prior to the election three speeches had been made by employer representatives to the employees (R. 15, first paragraph). The unions objected to these speeches on the grounds that they stated that the union's demands had forced other companies out of business and contained an implied threat to close the Sonoco plant (R. 8).

The Regional Director caused an ex parte administrative investigation to be made into these objections. Though the company contended a hearing should be held on the objections, it cooperated by obtaining copies of the speeches and furnishing them to the investigating agent on the latter's express promise that Sonoco would be given an opportunity to explain its position and contentions at a formal hearing before any decision was issued (R. 18). Nevertheless the Regional Director rendered a decision based solely upon the ex parte investigation, overturning the election and directing a new one (R. 11). This decision extracted portions of two paragraphs from one of the Sonoco speeches and held that the attempt made therein to explain why the regular annual increase in benefits could not be implemented

during the organizational campaign constituted illegal interference (R. 13, 14). The company's discussion of its benefit policy had not been among the portions of the speeches objected to by the unions (R. 8).

The company sought a review of this decision from the Board, complaining of the Regional Director's failure to consider the overall content and impact of all of the speeches and his refusal to afford the promised hearing (R. 17). This request for review was denied by the Board (R. 33).

On August 17, 1966, the second election was held, this time resulting in a vote of 16 to 14 in favor of the unions with one ballot being challenged (R. 34). The company filed objections to this election asserting that by threats and other conduct the unions had interfered with the employees' free choice (R. 35). Specifically, the company complained that threats of physical harm had been made to one employee and followed up by subsequent telephone calls, that another had been told that he would lose his job if the union were not voted in, and that on the day of the election a union organizer was present at the plant and spoke with some of the employees (R. 42, at 44-46; R. 49, at 52-54; R. 82, at 85-86 and 88-94).

Again the Regional Director caused an ex parte investigation to be made into the objections. In support of its contentions, Sonoco submitted to the investigator a signed statement by the employee threatened with physical harm and testimony by its plant manager concerning his observations and statements made to him by the employees involved (R. 88-93). However, no hearing on these matters was conducted; instead the Regional Director, on the basis of his ex parte investigation, concluded that the threat of bodily harm was legally immaterial, that no threat was con-

tained in the subsequent telephone calls, that the unions had not told an employee that he had better vote for them if he wanted to keep his job, and that the union organizer, assuming him to be such, did not speak with the employees on any matter related to the election (R. 42). So finding, the Regional Director affirmed the results of the election and certified the unions as the employees' bargaining representatives (R. 42).

The company again requested the Board to review the Regional Director's actions, claiming that it had submitted evidence which, if believed, would necessitate a setting aside of the election and that the Director was therefor required either to overturn the election, if he found the company's evidence to be uncontradicted, or to order a hearing if he found there to be conflicting evidence (R. 49). This request was also met by a telegraphic denial from the Board (R. 56).

Thereafter the unions filed a charge (R. 57, 58) and the Regional Director issued a Complaint and Notice of Hearing based thereon alleging that Sonoco had wrongfully refused to bargain after the second election (R. 59). The company answered denying the validity of the second election and alleging that the original election had been valid (R. 65).

At this juncture the Board's General Counsel interposed a motion for summary judgment, asserting that there was no issue of fact or law relevant to the unfair labor practice charge which required a hearing and that the company's refusal to bargain was established as a matter of law (R. 70). The Board transferred the case to itself and issued an order for the company to show cause why the General Counsel's motion should not be granted (R. 80), and thereupon the Regional Director withdrew the notice of hearing (R. 81). In response to the show cause order Sonoco reiter-

ated its various contentions, claiming that summary judgment was improper because there was insufficient basis in law or fact for the overturn of the first election, that the second election had been rife with interfering conduct by the unions and that a hearing, which to this point had been consistently denied, was necessary to resolve the various issues relative to the elections' validity *vel non* before the company could be found guilty of an unlawful refusal to bargain (R. 82).

These contentions were rejected by the Board which, without reviewing the content of either of the Regional Director's decisions, accepted them as conclusively establishing the invalidity of the first election and the validity of the second. The Board thereupon found that no hearing was required, summarily adjudged Sonoco guilty of an unfair labor practice and ordered it to bargain with the unions (R. 82).

From this order the instant appeal was taken (R. 105).

SPECIFICATION OF ERRORS RELIED UPON

1. In his ex parte decision overturning the results of the first election, without conducting a promised hearing, the Regional Director erred by extracting a small portion from one of three speeches made by employer representatives, considering that portion in isolation from the remainder of that and the other speeches, and attributing to that portion a narrow meaning which it could not reasonably bear.

2. The Regional Director erred in summarily overruling all the company's objections to the second election on the basis of his private investigation without affording the company a hearing on the substantial issues of law and fact that were raised by its objections.

3. By accepting the Regional Director's prior ex parte determinations as conclusive of the validity of each of the elections and entering a summary judgment predicated thereon, the Board deprived Petitioner of the hearing which both the Act and due process required be held on the issues underlying the unfair labor practice charge.

ARGUMENT

I. In His Ex Parte Decision Overturning the Results of the First Election, Without Conducting a Promised Hearing, the Regional Director Erred by Extracting a Small Portion from One of Three Speeches Made by Employer Representatives, Considering That Portion in Isolation from the Remainder of That and the Other Speeches, and Attributing to That Portion a Narrow Meaning Which It Could Not Reasonably Bear.

In his decision, reached after an ex parte investigation and without benefit of a hearing, the Regional Director singled out a minor portion of a speech made by Plant Manager Murry Hughes and held that the extracted remarks warranted an overturn of the first election.[1] We submit that the Regional Director's cryptic opinion places an interpretation upon Mr. Hughes' remarks which they cannot reasonably bear and in so doing violates the right of free speech guaranteed to the employer by the Constitution and Labor Act.

The practice of construing isolated segments of a speech without reference to the remainder of that speech or to the context in which the speech was made has been consistently disapproved by the Courts of Appeal and the Board. *E.g., N.L.R.B. v. Ralph Printing and Lithographing Company,* 379 F. 2d 687 (8th Cir. 1967); *N.L.R.B. v. Her-*

1. The Regional Director's decision appears at page 11 of the Record.

man Wilson Lumber Company, 355 F.2d 426 (8th Cir. 1966); *N.L.R.B. v. Spartan Manufacturing Company,* 355 F.2d 523 (7th Cir. 1966); *Indiana Rayon Corporation v. N.L.R.B.,* 355 F.2d 535 (7th Cir. 1966); *N.L.R.B. v. J. Weingarten, Inc.,* 339 F.2d 498 (5th Cir. 1964); *Union Carbide Corporation v. N.L.R.B.,* 310 F.2d 844 (6th Cir. 1962); *Decorated Products, Inc.,* 140 N.L.R.B. 1383 (1963); *Arch Beverage Corporation,* 140 N.L.R.B. 1385 (1963); *The Lux Clock Manufacturing Company, Inc.,* 113 N.L.R.B. 1194 (1955). Reference to the entirety of the Hughes speech, especially that part immediately preceding the portion quoted by the Regional Director, shows the discussion to have been directed to Sonoco's *past* wage policy as bearing on the issue of whether anything could be gained by unionization (R. 15). The comment on the proposed benefits for the current year formed a natural part of this discussion by way of illustration and explanation.

Nor is this the end of it. On the day in question three talks were made to the employees.[2] The one by Mr. Hughes (the only one mentioned in the Regional Directors opinion) was immediately followed by one by Mr. Harrison Martin.[3] Mr. Martin discussed the benefits so far made available to the employees and the fact that these were periodically reviewed and improved. These, he contended, were tangibles against which to weigh the promises of the union; and in this connection he addressed himself to the same matters which were found objectionable in the Hughes speech:

> "Now let's consider whether you should believe what the company is telling or what the unions are telling you. I have already told you that I have known the people at Sonoco for a long time and I know that you

2. This fact, and the chronology of the speeches, are reflected in the first sentence of the Hughes' speech (R. 15).

3. Mr. Martin's speech is to be found at page 25 of the Record.

can believe what they say. They are fair and honest and, in my opinion, there is not a better organization anywhere. They enjoy a high reputation in the business world. You should know this yourself without my telling you. You know what the company has done in the past and you know what you can expect from them in the future. Just before we were approached by the union, we had already begun this year's discussions and review of wages and fringe benefits. We had plans for putting in a job evaluation system which is a means of establishing base rates on every job in the plant and deciding how much difference there should be in base rates for each job. This system is in effect at other Sonoco plants and is put in with the help of the employees. You would elect two people to represent you and management would appoint two people to represent them or the company and they would sit down and analyze these jobs and decide how much each one of them should be paid in relation to other jobs in the plant. We had also discussed an increase in wages but because of the union election, we could not proceed with this work or these changes. If we had done so, we would certainly have been accused of trying to buy your vote" (R. 29, 30).

When Mr. Hughes' comments are read against the background of the Martin speech, the conclusions (and underlying inferences) drawn by the Regional Director cannot be supported. The obvious purpose and import of the speeches was to answer union propaganda concerning benefits by pointing out that Sonoco had in the past and would continue in the future to furnish as much in the way of benefits as was economically feasible. The wage and job evaluation programs were cited by way of example of this fact and clearly not with any motive to announce "a previous intent to provide benefits" (R. 13). Certainly nothing was said which would remotely indicate to the employees that this

was other than a temporary moratorium, or that the company's benefit policy might be different after the election than before, depending upon the outcome.

Moreover, Sonoco had no reasonable alternative to the course it followed. Had it granted the increase in benefits while the organizing campaign was underway, it undoubtedly would have been charged with interfering conduct.[4] See, *e.g., N.L.R.B. v. Exchange Parts Co.*, 375 U.S. 405 (1964); *N.L.R.B. v. Laars Engineers, Inc.*, 332 F.2d 664 (9th Cir. 1964); *N.L.R.B. v. Ralph Printing & Lithographing Company*, 379 F.2d 687 (8th Cir. 1967); *Standard Coil Products, Inc.*, 99 N.L.R.B. 899 (1952). Nor could Sonoco have reasonably withheld the increase without explanation, as the discussion of the company's past and continuing benefit policy naturally raised a question as to why that policy was not being carried out at the present time. Indeed, to have followed this course might itself have been interpreted as an act of coercion or reprisal.[5] Faced with this dilemma Sonoco could not reasonably avoid addressing itself to this issue; it did so by correctly observing that a grant of benefits in the context of an organizational campaign would expose it to a charge of bribery.

These comments by the company were well within its protected right of free speech. The Supreme Court in *N.L.R.B.*

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4. That the organizational activity occurred at a time when wage increases were due is a fact which, while true, finds no official embodiment in the Record. By not mentioning it, the Regional Director avoids coming to terms with it in his opinion. For him to have questioned it would clearly have raised a substantial and material issue of fact requiring a hearing. As to the latter point see the discussion, *infra*, in parts II and III of the brief.

5. See *Valley Feed & Supply Company, Inc.*, 135 N.L.R.B. 778 (1962), where the Board implied that a failure to grant a regular increase might be unlawful. Consider the impact on the employees of a discussion of the employer's past wage policy which makes absolutely no mention of the benefits which the employees presently expect.

v. Exchange Parts Co., supra, noted the distinction between conduct (*e.g.,* a grant of benefits) and commentary, the distinction being, of course, that the right of comment is guaranteed by the Constitution.[6] To protect this right from infringement by the Board Congress enacted section 8(c), which assures the employer full latitude to express arguments and opinions which do not rise to the level of threats or promises of benefit.[7] This right to comment is the right to meet union propaganda by explaining the employer's policies and pointing out the actual and potential disadvantages of unionization; that is, to attempt to persuade the employees that the better decision is to vote against the union. *E.g., Thomas v. Collins,* 323 U.S. 516, 532 (1945); *N.L.R.B. v. Laars Engineers, Inc.,* 332 F.2d 664 (9th Cir. 1964); *N.L.R.B. v. Spartan Manufacturing Company,* 355 F.2d 523 (7th Cir. 1966); *Indiana Rayon Corporation v. N.L.R.B.,* 355 F.2d 535 (7th Cir. 1966); *N.L.R.B. v. Herman Wilson Lumber Company,* 355 F.2d 426 (8th Cir. 1966); *N.L.R.B. v. J. Weingarten, Inc.,* 339 F.2d 498 (5th Cir. 1964); *Union Carbide Corporation v. N.L.R.B.,* 310 F.2d 844 (6th Cir. 1962); *Bonwit Teller, Inc. v. N.L.R.B.,* 197 F.2d 640 (2nd Cir. 1952), *cert. den.* 345 U.S. 905 (1953); and see, *Decorated Products, Inc.,* 140 N.L.R.B. 1383 (1963); *Arch Beverage Corporation,* 140 N.L.R.B. 1385

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6. In a footnote to its discussion the Court clearly indicated that words disassociated from conduct would raise an issue of free speech not present in its consideration of the employer's actual grant of benefits. 375 U.S. 405, 409, n.3.

7. See *N.L.R.B. v. Spartan Manufacturing Company,* 355 F.2d 523, 524 (7th Cir. 1966), concerning the reasons for the enactment of Section 8(c). The full text of section 8(c) of the National Labor Relations Act (29 U.S.C. sec. 158(c)), is as follows:

> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

(1963); *The Lux Clock Manufacturing Company, Inc.*, 113 N.L.R.B. 1194 (1955).

Included within this area of free speech is the right to discuss the company's benefit policy and to comment upon that policy in comparision with that promised or elsewhere obtained by the union. *N.L.R.B. v. Laars Engineers, Inc., supra; Arch Beverage Corporation, supra; Decorated Products Inc., supra.* And this extends to a discussion of presently planned or due benefits and the necessity to defer them during the union organizational activity. *Bonwit Teller, Inc. v. N.L.R.B. supra; The Lux Clock Manufacturing Company Inc., supra; Standard Coil Products Inc., supra;* and *cf. Dayco Corporation v. N.L.R.B.*, 382 F.2d 577 (6th Cir. 1967).

Indeed, the *Bonwit Teller* case is one on all fours with the case at bar. In a speech to the employees, the employer, after noting its policy of periodically reviewing wages, stated that raises had been recommended, but these could not be put through before the election lest the company be accused of an unfair labor practice.[8] The Board held that the " 'announcement of the pendency of wage increases . . . constituted a promise of benefit to the employees' " which interfered with their freedom of choice. The Board reasoned that it was immaterial that the company did not expressly condition the granting of the increase on the defeat of the union as the natural effect " 'of the announcement was to convince the employees that they did not need a union in order to obtain wage increases or other improvements in their conditions of employment.' " Rejecting the Board's construction, the Court held that the company's statements were nothing more than an explanation of why

8. This summary of the employer's speech, and the following discussion of the Board's holding, can be found in 197 F.2d at page 643.

the employees' right of semi-annual wage reviews had been stopped, and concluded:

> "Under the circumstances we think that the communications of Rudolph to his employees went no further than to indicate that increases in pay would follow the ordinary practice of the employer and fell short of promising benefits to the employees if they should vote against the Union. Indeed, to forbid such communication would seem to prohibit all discussions between employer and employee of issues germane to the subject of unionization." 197 F.2d at 644.

This reasoning, and that in the other cases cited herein, is conclusive of the error in the Regional Director's decision. Viewed in their entire context, Sonoco's comments, including those which the Regional Director found objectionable, were clearly within the realm of persuasion, not coercion. They simply will not reasonably bear the narrow construction he placed upon them, nor could the employees have so understood them.[9] The Courts have consistently resisted the Board's resort to such a "narrow and strained" construction to defeat the employer's right of legitimate comment. *N.L.R.B. v. Laars Engineers, Inc.,* 332 F.2d 664, 667 (9th Cir. 1964); *Union Carbide Corporation v. N.L.R.B.,* 310 F.2d 844, 845 (6th Cir. 1962); See also, *N.L.R.B. v. Sun Company of San Bernardino,* 215 F.2d 379 (9th Cir. 1954); *Dayco Corporation v. N.L.R.B.,* 382 F.2d 577 (6th Cir. 1967); *Indiana Rayon Corporation v. N.L.R.B.,* 355 F.2d 535 (7th Cir. 1966); *N.L.R.B. v. Herman Wilson Lumber Company,* 355 F.2d 426 (8th Cir. 1966). We submit the result should be the same in the instant case; the first election should be held to have been erroneously set aside.

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9. It is interesting to note that neither were they so understood by the unions who did not, in their objections to the results of the election, include any objection to the company's comments on its benefit policies (R. 8).

II. The Regional Director Erred in Summarily Overruling All the Company's Objections to the Second Election on the Basis of His Private Investigation Without Affording the Company a Hearing on the Substantial Issues of Law and Fact That Were Raised by Its Objections.

Sonoco raised several objections to the second election, the primary ones being a threat of physical harm to one employee, a threat of loss of job to another, and the unauthorized presence of a union agent. Any *one* of these, if established, would have required an overturn of the election. These were investigated ex parte by the Regional Director and, without benefit of a hearing, summarily rejected in his decision (R. 42). This decision reflects a misapplication of legal standards and a misunderstanding as to what constitutes an issue of fact which must be resolved by a hearing.

Though not questioning that a substantial threat of harm was directed at an employee,[10] nor that the threat was made in the presence of other employees,[11] the Regional Director nevertheless refused to consider the interfering nature of this conduct because "it occurred prior to the issuance of the Notice of Rerun Election" (R. 44). In so doing, the Regional Director acted directly contrary to the Board's decision in *The Singer Company,*[12] which held that the period for consideration of allegedly improper conduct

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10. See: Employers Objections to Election, par. V. (R. 38); Employer's Request for Review (R. 52); affidavit of Murry K. Hughes (R. 88) and statement by Mr. Mendonca (R. 92). The Regional Director's discussion of these matters can be found at R. 44 and 45.

11. See R. 44, where the Regional Director states in his decision that "[*a*]*ccording to the employees,* three union agents approached the car and tore up the sign."

12. 161 N.L.R.B. No. 87, 1967 CCH NLRB para. 20,874, 63 LRRM 1381 (1966). This decision was based upon earlier rulings to the same effect in *Ideal Electric and Manufacturing Company,* 134 N.L.R.B. 1275 (1961), and *Goodyear Tire & Rubber Company,* 138 N.L.R.B. 453 (1962).

begins to run from the date of the first election and not from the date the second election is directed. This rule is bottomed on common sense as obviously the notice of a new election does not act as an eraser which wipes from the employees' minds all effects of prior illegal conduct. It has an especial pertinence in the instant case where the earlier threat was reinforced by subsequent telephone calls. Had the Regional Director correctly taken cognizance of the threat and found it to have in fact been made, an overturn of the election would have been required. *E.g., N.L.R.B. v. Tampa Crown Distributors,* 272 F.2d 470 (5th Cir. 1959), *Progressive Mine Workers of America v. N.L.R.B.,* 187 F.2d 298, (7th Cir. 1951); *Gabriel Company Automotive Division,* 137 N.L.R.B. 1252 (1962); *National Gypsum Company,* 133 N.L.R.B. 1492 (1961); *Poinsett Lumber & Manufacturing Company,* 116 N.L.R.B. 1732 (1956); *Shipowners Association of the Pacific Coast,* 107 N.L.R.B. 1508 (1954); *G.H. Hess, Incorporated,* 82 N.L.R.B. 463 (1949).

The Regional Director's opinion continues with a discussion of the later telephone calls. From his private investigation the Regional Director purportedly found that the subsequent calls were "friendly" and did not constitute a threat (R. 45). Though he never discusses the mental state of mind of the threatened employee, his conclusion that there was no interference must be based upon the inference that the employee could not have been afraid. His reasoning was lent colorable support by ignoring the original threat which had been dismissed as legally irrelevant. This of course was error in light of *The Singer Company* case discussed above. And even apart from that case, it is contrary to both law and reason to consider acts in isolation from the context in which they take place or to ignore their combined effect, *i.e.,* in this case to treat the calls without consideration of the intimately related conduct which had preceded

them. *Cf. Home Town Foods, Inc. v. N.L.R.B.,* 379 F.2d 241 (5th Cir. 1967); *N.L.R.B. v. Trancoa Chemical Corp.,* 303 F.2d 456 (1st Cir. 1962).[13]

The Regional Director's inferential conclusion is, in addition, in direct conflict with evidence tendered by the company, to wit, the testimony of Mr. Hughes that Mr. Mendonca expressed fear over the later telephone calls. The Board's own rules require that a hearing be held whenever "substantial and material factual issues exist" concerning the objections to an election.[14] Yet here the Regional Director took it upon himself to resolve a factual conflict, drawing an inference which necessarily discredited the employer's evidence. Furthermore, this inference was based upon an investigator's private interviews with the persons involved, whose names were not known to Petitioner and whose testimony, assuming it to have been as represented by the Regional Director, was not subject to investigation or cross-examination by Petitioner. Unless the existence of a substantial factual issue is to be determined solely by a prior ex parte weighing and crediting by the Regional Director, such an issue was surely presented here.[15]

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13. See also the numerous cases cited on the total context rule, *supra,* at pages 6 and 7 of the brief.

14. N.L.R.B. Rules and Regulations, Series 8, as amended, Section 102.69(c). (29 C.F.R. sec. 102.69(c)). The text of this rule is set out in relevant part in Appendix A. This section of the brief is concerned with the Regional Director's unjustified refusal to order a hearing on the objections to the second election. The overall impact of the refusal to grant a hearing at any stage of the proceedings, from the overturn of the first election to the summary finding of an unfair labor practice, is the topic of the next section of the brief. The prejudicial effect of the refusal to afford a hearing on the results of the second election manifested itself in the subsequent bargaining order which was predicated upon the purported validity of the second election.

15. The presence of important factual issues is even clearer when it is considered that the Regional Director failed to take into account the existence, nature and circumstances of the threat itself.

Moreover, contrary to what the Regional Director's decision implies, the interfering nature of threats does not depend solely upon a detailed analysis of their effect on the employee (or employees) to whom they are directed. It has long been recognized that it is very difficult to measure the effect of such interfering conduct either on the person involved or on others who, as here, may have witness or learned of it. See, *e.g., United States Rubber Co.,* 86 N.L.R.B. 3 (1949). Therefore, the standards against which challenged conduct is measured are in large part objective rather than subjective. Thus, for example, the fact that the threats do not have their desired effect does not render them any less objectionable. *Progressive Mine Workers of America v. N.L.R.B.,* 187 F.2d 298 (7th Cir. 1951); *G.H. Hess, Incorporated,* 82 N.L.R.B. 463 (1949). Nor is the fact that only one employee was threatened controlling (*National Gypsum Co.,* 133 N.L.R.B. 1492 (1961); *United States Rubber Co., supra*), especially where, as in the instant case, the election takes place in a small plant with relatively few employees. *F. B. Rogers Silver Company,* 94 N.L.R.B. 205 (1951). In short, all the surrounding circumstances must be taken into account. *Cf. Poinsett Lumber & Manufacturing Company,* 116 N.L.R.B. 1732 (1956). These factors assume a greater than usual significance in this case where the outcome of the election turned upon *one* vote. But none of them were considered by the Regional Director, nor did he provide a hearing where the factual circumstances relevant to each could be developed.

The arbitrary refusal to afford a hearing was repeated as to the company's other objections. A union threat of loss of job such as that detailed in the Hughes affidavit (R. 89) would have required an overturn of the election.

Vickers Incorporated, Etc., 152 N.L.R.B. 793 (1965); *Caroline Poultry Farms Inc.,* 104 N.L.R.B. 255 (1953); and see, *Superior Wood Products, Inc.,* 145 N.L.R.B. 782 (1964). But the Hughes testimony was unilaterally rejected by the Regional Director in favor of the supposed denial of the coerced employee. The employer was given no opportunity to question the employee as to why his testimony had changed between the time he spoke with Mr. Hughes and his private interview with the Board agent, or to develop the relationship between the foreman and the employee or the other factual circumstances which would bear on what was said and its possible impact. Similarly, though the unauthorized presence and campaigning of a union organizer would have constituted vitiating interference (*Southwestern Electric Service Co. v. N.L.R.B.,* 194 F.2d 939 (5th Cir. 1952); *Gary Enterprises, Inc.,* 86 N.L.R.B. 431 (1949); *Continental Can Company,* 80 N.L.R.B. 785 (1948); *Detroit Creamery Co.,* 60 N.L.R.B. 178 (1945)), and though evidence was submitted that such was the case (R. 90, 91), the employer was refused a hearing in which to develop who was talked to and what was said.[16]

The Regional Director erred in each of the particulars outlined above. These errors, and the resulting prejudice, were rendered the more extreme by the closeness of the

16. On this latter issue the error was compounded by the application of an incorrect legal standard to the ex parte findings of fact. The strict laboratory conditions under which the Board insists elections be conducted is undermined by any conduct which is "reasonably calculated" to interfere with the employees' free choice. *American Tool Works of Hartford, Inc.,* 102 N.L.R.B. 1143, 1149 (1953). Interference is not dependent, as the Regional Director seemed to think, upon conduct which is so gross as to render free choice "impossible" (Regional Director's opinion at R. 46, first paragraph).

election which dictated that especial care be taken in scrutinizing the challenged conduct. Certainly the Director's conclusion that he had "found no evidence . . . which would warrant a hearing" (R. 46, n.2) cannot be supported. To borrow a phrase used by the Fifth Circuit when considering an almost identical situation:

> "This treatment of the matter by the Regional Director would obviate the necessity of ever having a hearing on objections to an election. The disputed facts were resolved without testimony under oath, without cross-examination, and without the procedural safeguards of a hearing." *N.L.R.B. v. Lamar Electric Membership Corporation,* 362 F.2d 505, 508 (5th Cir. 1966).

We submit the company's objections to the second election were on sound ground legally and factually and should have resulted in the election being set aside.

III. By Accepting the Regional Director's Prior Ex Parte Determinations as Conclusive of the Validity of Each of the Elections and Entering a Summary Judgment Predicated Thereon, the Board Deprived Petitioner of the Hearing Which Both the Act and Due Process Required Be Held on the Issues Underlying the Unfair Labor Practice Charge.

After hearings on the objections to both the first and second elections had been denied, the Board, again refusing a hearing, entered a summary judgment finding Sonoco guilty of an unlawful refusal to bargain. Thus Petitioner found itself adjudged guilty of an unfair labor practice without ever having had the opportunity, in the context of a hearing, to present evidence and refute adverse evidence relative to the issues underlying that de-

termination. This, we contend, is contrary to both the Act and the most basic concepts of due process.

A. THE BOARD'S ERROR IN SIMPLE OUTLINE.

The post election procedures of the Board provide for an ex parte administrative investigation into challenged conduct and, when proper, a decision by the Regional Director predicated thereon.[17] These procedures have been justified as necessary to expedite the representation issue and prevent dilatory tactics by unions and employers.[18] *N.L.R.B. v. Joclin Manufacturing Company,* 314 F.2d 627 (2nd Cir. 1963); *N.L.R.B. v. O. K. Van Storage, Inc.,* 297 F.2d 74 (5th Cir. 1961). They prevent unnecessary delay and expense by permitting summary disposition of allegations which are patently without basis in fact. *N.L.R.B. v. O. K. Van Storage, Inc., supra.* Similarly, they allow for a determination to be made without a hearing where even if all the facts contended for by the objecting party were true no grounds would be presented for setting aside the election. *N.L.R.B. v. Bata Shoe Company, Inc.,* 377 F.2d 821, 826 (4th Cir. 1967); *N.L.R.B. v. J. R Simplot Company,* 322 F.2d 170 (9th Cir. 1963). In such cases, unless addi-

17. N.L.R.B. Rules and Regulations, Series 8, as amended, Section 102.69(c). (29 C.F.R. sec. 102.69(c)). Relevant text of the Rule is set out in Appendix A.

18. For similar reasons no appeal lies from the affirmance of the results of an election or the direction of a new one. The employer can seek Court review of these rulings only on appeal from an unfair labor practice finding and order. See *N.L.R.B. v. Ortronix, Inc.,* 380 F.2d 737, 739 (5th Cir. 1967); *N.L.R.B. v. Ideal Laundry and Dry Cleaning Co.,* 330 F.2d 712, 715 (10th Cir. 1964).

tional evidence is tendered at the unfair labor practice proceedings, the total absence of factual issues make a hearing unnecessary at either the representation or unfair labor practice stages. *N.L.R.B. v. J. R. Simplot Company, supra; N.L.R.B. v. Bata Shoe Company, Inc., supra; NLR.B. v Ideal Laundry and Dry Cleaning Co.,* 330 F.2d 712 (10th Cir. 1964).

However, these procedures offer opportunity for abuse by the Board and it has not infrequently applied them in a manner contrary to procedural due process. Too frequently they have been used, not to weed out the frivolous case, but merely to arrive at an ex parte disposition of cases for purposes of closing the files. Such a unilateral determination is of course no substitute for the hearing which must be held on the unfair labor practice charge,[19] a fact of which the Courts have had increasing occasion to remind the Board. The practice of discounting the employer's offer of proof on the basis of conflicting evidence collected during an ex parte investigation cannot be squared with due process. *N.L.R.B. v. Bata Shoe Company, Inc.,* 377 F.2d 821 (4th Cir. 1967); *N.L.R.B. v. Capital Bakers, Inc.,* 351 F.2d 45 (3rd Cir. 1965); *N.L.R.B. v. Ideal Laundry and Dry Cleaning Co.,* 330 F.2d 712 (10th Cir. 1964); *N.L.R.B. v. Joclin Manufacturing Company,* 314 F.2d 627 (2nd Cir. 1963). Nor can matters of weight and credibility be determined except in the context of a hearing. *N.L.R.B. v. Capital Bakers, Inc. supra; N.L.R.B. v. Lord Baltimore Press, Inc.,* 300 F.2d 671 (4th Cir. 1962); *N.L.R.B. v. Dallas City Packing Co.,* 230 F.2d 708 (5th Cir. 1956). And where, as here, the employee's state of mind is a relevant issue,

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19. Section 10(b) of the National Labor Relations Act. (29 U.S.C. sec. 160(b)) This section is set forth in toto in Appendix B.

there is a special need for the safeguards of a hearing. *Home Town Foods, Inc. v. N.L.R.B.*, 379 F.2d 241 (5th Cir. 1967); *N.L.R.B. v. Joclin Manufacturing Company, supra.*

This catalogue of "don'ts" is, in the instant case, an exact measure of what the Regional Director did.[20] After both elections he conducted private investigations and rendered an opinion based upon what those investigations purportedly revealed. The first election was reversed on grounds which, until it was presented with the *fait accompli* of the Regional Director's decision, the employer did not even know were being considered.[21] The employer's objections to the second election, and the evidence submitted thereon, were discounted on the basis of supposed contradictory evidence revealed by the secret investigation. Yet at the unfair labor practice proceedings the Board held that, as the various issues underlying the objections to the two

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20. In so doing he also acted in contravention of the Board's rules. See the discussion in II, *supra,* and Rule 102.69(c) cited therein at footnote 14.

21. This is a problem employers all too frequently face in these ex parte investigations. The Regional Director claims no responsibility to disclose either information obtained during his investigation or the course of that investigation. This is usually justified as necessary to protect the confidence of the employees who are privately interviewed by the investigating agent. While the latter is undoubtedly a legitimate consideration, petitioner doubts it affords a tenable basis for the Board's policy of refusing to apprise the employer to any extent of either the factors which the Regional Director is considering or non-confidential information claimed to have been uncovered. Certainly it cannot be justified where the Board later, without a hearing, predicates an unfair labor practice finding in part on an earlier determination which itself was based solely on the results of such a secret investigation. See *N.L.R.B. v. Ideal Laundry and Dry Cleaning Co.*, 330 F.2d 712 at 716 (10th Cir. 1964), for one Court's disapproval of this clandestine procedure as a substitute for an unfair labor practice hearing.

elections had been conclusively determined by the earlier ex parte procedures, it need not afford the company the hearing which the Act requires, and, so holding, it summarily found Sonoco guilty of an unlawful refusal to bargain.

In thus holding the Board clearly erred. The substantial issues surrounding the elections' validity did not drop from the scene merely because the Regional Director failed to to acknowledge them. By routinely accepting the Director's unilateral pronouncements as conclusive, the Board perpetuated the error and deprived Petitioner of the hearing to which it was entitled under Section 10 of the Act. Such a foreclosure of a hearing has received unanimous judicial disapproval. The result has consistently been that which we contend should be reached here: The courts have declined to enforce the Board's Order and remanded for a hearing. *E.g., N.L.R.B. v. Ortronix, Inc.,* 380 F.2d 737 (5th Cir. 1967); *Home Town Foods, Inc. v. N.L.R.B.,* 379 F.2d 241 (5th Cir. 1967); *N.L.R.B. v. Bata Shoe Company, Inc.,* 377 F.2d 821 (4th Cir. 1967); *N.L.R.B. v. Lamar Electric Membership Corporation,* 362 F.2d 505 (5th Cir. 1966); *N.L.R.B. v. Capital Bakers, Inc.,* 351 F.2d 45 (3rd Cir. 1965); *N.L.R.B. v. Ideal Laundry and Dry Cleaning Co.,* 330 F.2d 712 (10th Cir. 1964); *N.L.R.B. v. Joclin Manufacturing Company,* 314 F.2d 627 (2nd Cir. 1963); *N.L.R.B. v. Lord Baltimore Press, Inc.,* 300 F.2d 671 (4th Cir. 1962); *N.L.R.B. v. Dallas City Packing Company,* 230 F.2d 708 (5th Cir. 1956); *N.L.R.B. v. Poinsett Lumber and Manufacturing Company,* 221 F.2d 121 (4th Cir. 1955).[22]

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22. The *Poinsett Lumber and Manufacturing Company* saga affords a good example of the vice inherent in the Board's ex parte procedures. After the election, which it lost, the employer filed objections complaining of physical and economic threats directed at the employees. The Regional Director conducted a private in-

B. A CRITIQUE OF THE BOARD'S USE OF THE SUMMARY JUDGMENT DEVICE.

The starting point for this discussion is the hearing which, in Section 10(b), Congress has specifically provided must be held on the unfair labor practice charge.[23] This hearing is governed by the provisions of the Administrative Procedure Act (5 U.S.C. sec. 1001, *et seq.*), which in turn were enacted to ensure that the requisites of procedural due process would be applied by government agencies. To paraphrase Professor Davis, the key to the hearing thus provided for is the opportunity of each party to know and to meet the evidence and the argument on the other side, and this includes the opportunity to present evidence and argument and to cross-examine opposing witnesses. 1 Davis, *Administrative Law,* sec. 7.01, p. 407 (1958). To similar effect is the statement of the Court of Appeals for the Fourth Circuit that to satisfy the requirements of due process the objecting party must be "given the opportunity to be heard, to call and cross-examine those who are the source of Board evidence, and to present pertinent evidence of its

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vestigation and issued a report concluding that the objections were "without merit". The Board adopted this report and dismissed the objections as raising no substantial issue. 107 N.L.R.B. 234. The employer refused to bargain, and at the subsequent unfair labor practice hearing again sought to be heard on the issues underlying its objections. However, the trial examiner refused to receive any evidence relating to these threats, holding the prior proceeding to be conclusive of the objections' lack of merit. The Board adopted the trial examiner's decision and ordered the company to bargain. 109 N.L.R.B. 1079. On appeal from this order, the Court held that the refusal at all stages to provide the company with a hearing was error and remanded accordingly. At the ensuing hearing, and in the Board's decision predicated thereon, it was found that the claimed threats had indeed been made and that as a result the election had been conducted in such "an atmosphere of fear and reprisal" that it should be set aside. 116 N.L.R.B. 1732, 1739.

23. National Labor Relations Act, Section 10(b). (29 U.S.C. sec. 160(b)) See Appendix B for text.

own." *N.L.R.B. v. Bata Shoe Company, Inc.,* 377 F.2d 821, 826-27 (4th Cir. 1967).

Of course no such hearing was held here. According to the Board's rationale, none was required because the Regional Director had considered and rejected Sonoco's contentions with respect to each of the elections and therefore, concluded the Board: "there are no issues of fact or law which require a hearing. Thus, as all material issues have been decided by the Board in accordance with the allegations in the complaint, the General Counsel's Motion for Summary Judgment is granted." (Decision of the Board, R. 96 at page 4). This being the Board's reasoning, it is fruitful to compare the manner in which "all material issues" were "decided" in this case with the normal situation where the summary judgment device is applied. To do so is to demonstrate that the procedures employed by the Board in the instant case made a mockery of the due process hearing requirements described by the above authorities.

It is axiomatic that courts approach summary judgment motions with great caution. As the procedure may deprive a party of his right to a trial, it is bounded by the strictest safeguards. The most basic tenet is that such a motion can be granted only if "there is no genuine issue as to *any* material fact." *New and Used Auto Sales, Inc. v. Hansen,* 245 F.2d 951, 953 (9th Cir. 1957) (emphasis added). The moving party has the burden of proof and this burden is a heavy one. All inferences of fact are to be drawn against him and in favor of the other party. *Griffeth v. Utah Power and Light Company,* 226 F.2d 661 (9th Cir. 1955); 6 Moore, *Federal Practice,* sec. 56.15(3), pp. 2335, 2337 (1966). Any doubt, no matter how slight, as to whether there is an issue of fact must be resolved against the moving party and in favor of a trial. *United States v. Farmers Mutual Insurance Association of Kiron, Iowa,* 288 F.2d 560, 562 (8th Cir.

1961); *Doehler Metal Furniture Company v. United States,* 140 F.2d 130, 135 (2nd Cir. 1945). Of course matters of weight and credibility can never be considered but must be left to the safeguards of trial procedures, *e.g.,* cross examination. *Sartor v. Arkansas Natural Gas Corp.,* 321 U.S. 620 (1944). Moreover, a large variety of materials, ranging from the pleadings themselves to oral testimony, can be resorted to in determining whether any issue of fact remains in dispute. See generally, 6 Moore, *supra,* sec. 56.1(1), p. 2143. Finally, the motion is subject to argument before the court, where counsel are able to call attention to facts and factual inferences which may pose a conflict, and to relevant principles of law which would render these conflicts material.

These safeguarding principles contrast sharply with the lax standards attending the Board's post election procedures. The Regional Director causes his own investigation to be made into the objections. The burden of proof falls to the objecting party who is not necessarily the one who later moves for summary judgment.[24] During the investigation private interviews are conducted the results of which are not disclosed to the objecting party, who thus has no opportunity to refute any evidence thereby purportedly obtained. No one is privy to this evidence except the Regional Director and seldom does he spell it out in his decisions: witness the decisions in the instant case. Moreover, the Regional Director assumes the freedom (demonstrated with respect to the first election in this case) to affirm or deny the validity of the election on any grounds, whether or not these were included in the objections formally lodged and whether or not the parties have been apprised of, and had

24. For example, the burden was on Petitioner, as the objecting party, to overturn the second election, yet it was on the receiving end of the summary judgment motion.

the opportunity to submit evidence concerning, these grounds.

Petitioner does not mean to suggest that the mechanism of summary judgment has absolutely no place in the unfair labor practice proceedings. If a hearing is held at the representation stage then clearly the Board need not, in the unfair labor practice case, relitigate issues which were decided at the prior hearing. *N.L.R.B. v. KVP Sutherland Paper Company,* 356 F.2d 671 (6th Cir. 1966). And, as this Court has recognized, if there is really no dispute as to the facts or if the Regional Director's determination is based upon the assumption that the employer's proffered evidence is true, then again a hearing need not be held. *N.L.R.B. v. J.R. Simplot Company,* 322 F.2d 170 (9th Cir. 1963); and see, *Producers Livestock Marketing Association v. United States,* 241 F.2d 192, 196 (10th Cir. 1957).

But such was not the situation here. Rather the company's factual contentions were dismissed upon the basis of contrary evidence obtained during a secret investigation. The company never, at any stage of the proceedings, had an opportunity to know and meet this adverse evidence, to cross-examine those who were its source, or to submit evidence of its own. This was the procedure by which the outcome of a close election was determined and by which the company was found guilty of a refusal to bargain. Clearly, no court would tolerate such procedure; and certain it is that no court would have granted summary judgment in the circumstances here present. We submit that the procedure is no less contrary to the precepts of due process when employed by the Board to deprive a party of the hearing to which it is entitled on an unfair labor practice charge. The Board's Order should be vacated. See *Kirby v. Shaw,* 358 F.2d 446 (9th Cir. 1966); *N.L.R.B. v. Bata Shoe Company, Inc.,* 377 F.2d 821 (4th Cir. 1967); *N.L.R.B. v. Ortronix,*

Inc., 380 F.2d 737 (5th Cir. 1967); *N.L.R.B. v. Ideal Laundry and Dry Cleaning Co.,* 330 F.2d 712 (10th Cir. 1964); *N.L.R.B. v. KVP Sutherland Paper Company,* 356 F.2d 671 (6th Cir. 1966); *N.L.R.B. v. Poinsett Lumber & Manufacturing,* 221 F.2d 121 (4th Cir. 1955).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a decree should be entered vacating the Board's Order and either affirming the validity of the first election or remanding the case for a full hearing on all issues relevant to the unfair labor practice charge, including the validity *vel non* of each of the elections.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

E. Judge Elderkin

(Appendices Follow)

Appendix A

N.L.R.B. Rules & Regulations, Series 8, as amended, Section 102.69(c) (29 C.F.R. sec. 102.69(c)):

(c) If objections are filed to the conduct of the election or conduct affecting the result of the election, or if the challenged ballots are sufficient in number to affect the result of the election, the regional director shall investigate such objections or challenges, or both . . . If the election has been conducted pursuant to a direction of election issued following any proceeding under section 102.67, the regional director may (1) issue a report on objections or challenged ballots, or both, as in the case of a consent election pursuant to section 102.62(b), or (2) exercise his authority to decide the case and issue a decision disposing of the issues and directing appropriate action or certifying the results of the election. In either instance, such action by the regional director may be on the basis of an administrative investigation or, if it appears to the regional director that substantial and material factual issues exist which can be resolved only after a hearing, on the basis of a hearing before a hearing officer, designated by the regional director . . .

Appendix B

National Labor Relations Act, Section 10(b) (29 U.S.C. sec. 160(b)):

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C).